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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. TERRY EUGENE BALL, Defendant and Appellant.	F075056 (Super. Ct. No. BF159927A) **OPINION**

APPEAL from a judgment of the Superior Court of Kern County. John W. Lua, Judge.

Scott Concklin, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Stephen G. Herndon and Darren K. Indermill, Deputy Attorneys General, for Plaintiff and Respondent.

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STATEMENT OF THE CASE

In an information filed October 22, 2015, the Kern County District Attorney charged defendant with one count of committing a lewd and lascivious act upon a child under 14 years by force, violence, duress, menace, or threat of great bodily harm (count 1; Pen. Code,[1] § 288, subd. (b)(1)); and one count of committing a lewd and lascivious act upon a child under 14 years (count 2; § 288, subd. (a)). The information alleged both counts were committed during the commission of a residential burglary under section 667.61, subdivision (e)(2) and a residential burglary under section 667.61, subdivision (d)(4). The information further alleged both counts were committed against a child under 14 years pursuant to section 667.61, subdivisions (j)(1) and (j)(2). Finally, the information alleged defendant had two prior strike convictions (§§ 667, subds. (c)–(j); 1170.12, subds. (a)–(e)); two prior serious felony convictions (§ 667, subd. (a)); and two prior convictions under section 667.61, subdivision (d)(1).

A jury was empaneled and eventually instructed that count 2 was a lesser included offense of count 1, and that if they found defendant guilty of the "greater" crime (i.e., count 1), then they should not complete or sign any verdict form for the "lesser" crime (i.e., count 2).

The jury convicted defendant on count 1, and found true all of the allegations charged under section 667.61. The court subsequently found the prior conviction enhancements true.

The court sentenced defendant to a term of life imprisonment without the possibility of parole on count 1, plus five years for one of the prior serious felony

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[1] All further statutory references are to the Penal Code.

enhancements (§ 667, subd. (a)).[2] The court also imposed several fines and fees, including a fine of $300 pursuant to section 1202.45.[3] Count 2 was dismissed on the condition that the verdict on count 1 remains in effect.

Defendant now appeals. As explained below, we will strike the enhancement imposed under section 667.61, subdivision (d)(4), as well as the $300 fine imposed under section 1202.45. We also accept the parties' concession that the matter must be remanded to allow the superior court to consider whether defendant's prior serious felony enhancement should be stricken. We reject defendant's remaining contentions and affirm the judgment in all other respects.

STATEMENT OF FACTS

Jane Doe was born in March 2003. In April 2015—when Doe would have been barely 12 years old—she lived in a two-story apartment with her family.

At around 6:00 p.m. on April 20, 2015, Doe's uncle saw a man standing near the apartment complex, having a beer. The man was "White," and had "very short hair" and tattoos. The man was wearing shorts and at least one glove. At one point, the man put on a black sweater with stripes. After some 10 or 15 minutes, Doe's uncle left. Less than five minutes later, he called his wife, and she said there was no longer anyone there.

At around 6:30 p.m., Doe was lying down on her bed, sending text messages to her friends and listening to music. "[A]ll of a sudden," Doe felt the weight of a person on her, and felt someone cover her mouth. The assailant pulled down her pants and underwear exposing her bottom. Doe tried to "g[e]t out of there." She and the assailant

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[2] The court struck the other prior serious felony enhancement for sentencing purposes only.

[3] The court referred to it as a "restitution fine," but the parties acknowledge it was a parole revocation fine.

fell to the floor. Doe began screaming and crying, and the assailant "started running." The assailant left out the front door and ran.

The clothes that had been in Doe's mother's dresser drawers had been taken out. Money and jewelry in the drawers had not been taken. Doe's mother's bras and panties were found on the floor of Doe's bedroom, and had not been there before.

Doe never saw the assailant's face but saw that he was wearing a "kind of grayish" hoodie sweater. At trial, Doe did not remember telling police officers that the assailant had told her to be quiet. Nor did she remember telling officers that she "elbowed" the assailant when he pulled her pants down.

Officers responded to the scene. While officers were still investigating, a boy on a bicycle approached one of the officers and said, "He's up there. He's up there," and pointed north. An officer headed that direction and arrived at the intersection of South Brown Street and South Haley Street. There, he saw about 50 people standing around, several of whom were pointing to a residence and saying, "He's over there, he's over there." The officer saw defendant partially hidden by bushes in front of the residence. Defendant was unconscious, had blood coming from his nose and mouth, and appeared to have been "beaten up." Officers were unable to determine who had "beaten up" defendant. When pulled out of the bushes, defendant had been wearing a gray hoodie sweatshirt, shorts, one glove, and an ankle monitor.

Officers brought Doe over for a possible in-field identification. The officer told Doe they were going to show her someone who "may or may not have been involved in the crime." Doe said she had never seen the assailant's face, but could identify defendant as the perpetrator based on his clothing, size, and shape. Doe was 100 percent sure defendant was the assailant. Doe's uncle said the man being identified was the same person he had seen near the apartments before the attack.

Detectives later interviewed Doe and the recording of that interview was played to the jury pursuant to a stipulation.

The GPS data from defendant's ankle monitor indicated the device was in a back alley near Doe's apartment complex at 6:28 p.m. At 6:41 p.m., the device was in the same vicinity, but closer to the apartment complex. By 6:51 p.m., the device had moved near the intersection of Haley and Brown. It appeared the device had been moving quickly up to that intersection.

Swabs for DNA

The parties stipulated that samples taken for DNA testing in the case had been obtained and tested using proper procedures to ensure reliability. The parties also stipulated that the samples were actually taken from the person or location they purported to be from. Finally, the parties stipulated that analysts could "testif[y] to" results of tests conducted by another analyst.

Several swabs were taken from Doe's body. A right arm swab contained a mixture of DNA and the results were inconclusive as to defendant. A left arm swab contained DNA from at least one male, but defendant was excluded as a contributor. No male DNA was located in swabs taken from Doe's mouth.

Several swabs were also taken from the master bedroom. Defendant was excluded as a contributor to those samples.

Prior Offense

The prosecution presented evidence of a prior offense from December 8, 2002. Defendant entered a woman's townhouse, and told her he would kill her if she screamed. Defendant put a pillow over her face, put his fingers into her vagina, and "rubbed his hip across [her] lips." The victim told him to leave, and defendant apologized and left. The victim later realized defendant had gone through her laundry.

DISCUSSION

I. The Court did not Misstate the Mental State Element of Count 1

A. Background

Defendant argues the court's instruction on forcible lewd touching "misstated the mental element of the offense." He also contends his counsel was ineffective for failing to request further instruction on the issue.

Section 288, subdivision (b) is violated when the defendant "willfully and lewdly commits any lewd or lascivious act … upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child" (§ 288, subd. (a)) and does so "by use of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person." (§ 288, subd. (b).)

The court instructed the jury on the elements of count 1 with CALCRIM No. 1111, as follows:

> "One, the defendant willfully touched any part of a child's body either, on the bare skin or through the clothing;
>
> "Two, in committing the act, the defendant used force, fear, or violence upon the child;
>
> "Three, the defendant committed the act with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of himself or the child;
>
> "And, four, the child was under the age of 14 years at the time of the act."

Defendant acknowledges that the court's instruction "mirrors the language of the statute." However, he contends that the instruction does not reflect judicial construction of the statute, which requires a "present and immediate" intent to gratify or arouse. For

example, this court in *People v. Austin* (1980) 111 Cal.App.3d 110 (*Austin*), acknowledged that it "may be argued" that certain forms of contact—like pushing a child—might be for the purpose of moving the victim to a more secluded area rather than for the purpose of gratifying sexual desires. (*Austin, supra*, 111 Cal.App.3d at pp. 113–114; see also *People v. Lopez* (1998) 19 Cal.4th 282, 295 (conc. opn. of Baxter, J.).) We concluded in *Austin* that the ultimate issue was whether the touching "was done for the purpose of some immediate sexual gratification." (*Austin*, at p. 113; see *People v. Martinez* (1995) 11 Cal.4th 434, 452 ["the People are required to prove that the defendant touched the child in order to obtain immediate sexual gratification"].)

B. Analysis

We do not agree that CALCRIM No. 1111 fails to convey the "immediate gratification" requirement. The "act" described in element three of the instruction, is the "touch[ing]" described in element one. Thus, the jury would have understood element three of the instruction to require that the defendant touch the victim *with* the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of himself or the victim. [4] (CALCRIM No. 1111, elements 1 & 3.) That is, the jury would have understood that the defendant must have intended for the touching itself to gratify his sexual desires, not merely prepare the way for some gratifying touch in the future.

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[4] This requirement is also reflected in the court's instruction on the union of act and intent, which were given as follows:

> "The crimes and other allegations charged in this case require proof of the union or joint operation of act and wrongful intent. For you to find a person guilty of the crimes in this case or to find the allegations true, that person must not only intentionally commit the prohibited act, but must do so with a specific intent. The act and the specific intent required are explained in the instruction for that crime or allegation."

Defendant contends the use of gerunds like "arousing" and "gratifying" bolster his position more than if the instruction had used infinitives like "to arouse" or "to gratify." Specifically, defendant argues that a "touch done with the intent 'to arouse' or 'to gratify' would suggest that concurrent and immediate arousal or gratification was the intent of the touching" whereas gerunds would not convey the same understanding. We disagree. In our view, saying "the defendant touched the victim with the intent to gratify his sexual desires" conveys the same immediacy of purpose as saying "the defendant touched the victim with the intent of gratifying his sexual desires."

In sum, CALCRIM No. 1111 correctly conveys the requirement that a defendant must touch the victim *with* the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of himself or the child. Therefore, we reject defendant's challenge to the instruction, and his related ineffective assistance of counsel claim.[5] (See *People v. Beasley* (2003) 105 Cal.App.4th 1078, 1091 [counsel is not ineffective for failing to object to a correct instruction].)

II. The Court Did not Err in Failing to Instruct the Jury on the Lesser Included Offense of Attempted Forcible Lewd Act

Defendant next argues the court erred in failing to instruct the jury on attempted lewd touching as a lesser included offense. We disagree.

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[5] Defendant says the prosecutor exacerbated the ambiguity of the court's instruction by arguing that "any touching that's lewd" violates the statute. Defendant argues this was misleading because the prosecutor did not discuss the mental element required for the offense. But the prosecutor *did* discuss the intent element shortly thereafter, saying, "In addition to that, I have to show that when the person committed this act, they had the intent of arousing, appealing, or gratifying the lust, passion, or sexual desire of himself or the child." We see nothing misleading about the prosecutor's argument on this point.

A. Law

The parties do not dispute that attempting a lewd and lascivious act with a child under the age of 14 years is a lesser included offense of the completed crime. (Cf. § 1159.) "[S]ection 288 is violated by 'any touching' of an underage child committed with the intent to sexually arouse either the defendant or the child." (*People v. Martinez, supra,* 11 Cal.4th at p. 442.) "[S]ection 288 prohibits *all* forms of sexually motivated contact with an underage child." (*Id.* at p. 444.)

"A lesser included offense is one that is necessarily committed when another, greater offense is committed …." (*People v. Joiner* (2000) 84 Cal.App.4th 946, 971.) "Under California law, trial courts must instruct the jury on lesser included offenses of the charged crime if substantial evidence supports the conclusion that the defendant committed the lesser included offense and not the greater offense."[6] (*People v. Gonzalez, supra,* 5 Cal.5th at p. 196; *People v. Breverman* (1998) 19 Cal.4th 142, 162.) The question is whether there "is evidence from which reasonable jurors could conclude that the lesser offense, but not the greater, was committed." (*People v. Mullendore* (2014) 230 Cal.App.4th 848, 856 (*Mullendore*).) In answering this question, we "view the evidence in the manner most favorable to the defendant" while "[d]rawing all reasonable inferences in defendant's favor." (*Mullendore*, *supra*, 230 Cal.App.4th at p. 856; see *People v. Millbrook* (2014) 222 Cal.App.4th 1122, 1137; *People v. Turk* (2008) 164 Cal.App.4th 1361, 1368, fn. 5.)

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[6] Defendant says his trial counsel was ineffective for failing to request an instruction on attempt. We disagree. The court's duty to instruct on lesser included offenses "persists irrespective of whether the parties request such an instruction." (*People v. Gonzalez* (2018) 5 Cal.5th 186, 196.) Substantial evidence did not support such an instruction in this matter.

B. Analysis

Here, substantial evidence did not support instruction on the lesser included offense of attempt to commit a forcible lewd act. Appellant entered Doe's bedroom after rummaging through her mother's undergarments and carrying some of them into Doe's bedroom. He restrained Doe and pulled down her pants and underwear exposing her bottom. Although appellant may have intended to do more, such as committing additional sexual crimes, there is no question he violated section 288, subdivision (b)(1). He willfully touched Doe with the intent of arousing, appealing to, or gratifying his lust, passions or sexual desires. (§ 288, subds. (a), (b)(1).) There was no evidence from which reasonable jurors could have concluded that the lesser offense of attempt, but not the greater charge, was committed. (See *Mullendore, supra,* 230 Cal.App.4th at p. 856.)

Based on this record, the trial court did not err in failing to instruct the jury on the lesser included offense of attempt. The evidence did not raise a question whether all of the elements of the charged offense were present. (See *People v. Breverman, supra,* 19 Cal.4th at p. 154.) No evidence existed or reasonably suggested that a lesser offense occurred. To the contrary, the evidence overwhelmingly established that appellant was guilty of violating section 288, subdivision (b)(1). Accordingly, appellant's assertions are without merit, and this claim fails.

III. Defendant Forfeited his Claim of Instructional Error as to the Parties' Stipulation Concerning Doe's Recorded Interview; In any Event, the Claim Lacks Merit

A. Background

During trial, the following exchange occurred with the jury present:

"[PROSECUTOR]: … At this time we have a stipulation between the parties.

"[DEFENSE COUNSEL]: And I'll read it at this time.

"It says, stipulated between the parties that the following recorded interview between [Doe] and Detectives McAfee and Davenport, which occurred at the Bakersfield Police Department on April 20th, 2015, on or about 9:26 p.m., can be played and considered by the jury.

"THE COURT: So stipulated, [prosecutor]?

"[PROSECUTOR]: So stipulated.

"THE COURT: Court will receive that stipulation.

"Ladies and gentlemen, that is a stipulation, or an agreement, entered into between the parties. And because they are stipulating to certain facts, they are showing those facts are not in dispute, and you, therefore, have to accept those facts as true."[7]

Defendant contends the court erred in instructing the jury to "accept those facts as true." Defendant argues the jury would have naturally understood the instruction to "require[]" that they accept Doe's statements in the interview as true. We disagree. We also find the contention forfeited.

B. Forfeiture

Failure to request clarification or additional instruction in the trial court forfeits the claim on appeal. (*People v. Buenrostro* (2018) 6 Cal.5th 367, 428.)

Defendant cites section 1259[8] and argues that instructional error is reviewable on appeal even without an objection if the error affected defendant's substantial rights.

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[7] The court gave a similar instruction at the close of evidence: "During the trial you were told that the People and the defense agreed or stipulated to certain facts. This means that they both accept those facts as true. Because there is no dispute about those facts, you must also accept them as true."

[8] Section 1259 provides:

"Upon an appeal taken by the defendant, the appellate court may, without exception having been taken in the trial court, review any question of law involved in any ruling, order, instruction, or thing whatsoever said or done at the trial or

While section 1259 is written broadly, courts have developed a distinction as to which instructional challenges require a trial-level objection, and which do not. A defendant need not object to preserve a challenge to an instruction that *incorrectly* states the law and affects his or her substantial rights. But when the defendant is challenging a *correct* instruction that was "too general or incomplete," he or she must have requested appropriate clarifying or amplifying language in the trial court. (*People v. Buenrostro, supra,* 6 Cal.5th at p. 428; see *People v. Mackey* (2015) 233 Cal.App.4th 32, 106; *People v. Tuggles* (2009) 179 Cal.App.4th 339, 364–365.) Here, the court did not misstate the law. It correctly told the jury that stipulated facts are not in dispute and must be accepted as true. If defendant wanted the court to make clear that the parties were *not* stipulating to the accuracy of Doe's statement in the interview, he should have requested such an instruction. He failed to do so and forfeited the issue for appeal.

C. Merits

In any event, defendant's claim lacks merit. Contrary to defendant's claim, jurors were not "[l]eft to wonder what facts they were required to accept as true." It was quite clear that the jury was required to accept as true: "that the following recorded interview between [Doe] and Detectives McAfee and Davenport, which occurred at the Bakersfield Police Department on April 20th, 2015, on or about 9:26 p.m., can be played and considered by the jury." Certainly, the stipulation primarily concerned the admissibility of the evidence, as defendant suggests. But the stipulation also conveyed factual information to the jury, not the least of which was identifying the participants in the

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> prior to or after judgment, which thing was said or done after objection made in and considered by the lower court, and which affected the substantial rights of the defendant. The appellate court may also review any instruction given, refused or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby."

interview (i.e., the voices on the recording: Doe and Detectives McAfee and Davenport). We are confident the jury would not have taken the court's instruction to mean that Doe's statements in the interview were undisputedly true.

IV. Burglary Enhancements Under Section 667.61

Defendant argues that he should not have been subjected to enhancements under subdivisions (d)(4) and (e)(2) of section 667.61 simultaneously. He contends the subdivision (d)(4) enhancement should be stricken, and the Attorney General agrees.

The section 667.61, subdivision (d)(4) enhancement applies when a defendant commits an offense "during the commission of a burglary of the first degree … [(§ 460, subd. (a))], with intent to commit …" a lewd and lascivious touching under section 288, subdivision (b). (§ 667.61, subds. (d)(4) & (c)(4).)

The section 667.61, subdivision (e)(2) enhancement applies when defendant commits the offense during the commission of a burglary (§ 459) *"[e]xcept as provided in paragraph (4) of subdivision (d)*." (§ 667.61, subd. (e)(2), italics added.)

Thus, the parties agree that at least when there is a single burglary, only one of the two enhancements may be imposed. We accept the concession, and will order the section 667.61, subdivision (d)(4) enhancement stricken.

V. Parole Revocation Fine

Defendant argues the parole revocation fine must be stricken because he was sentenced to a term of life imprisonment without the possibility of parole. The Attorney General agrees. We accept the concession (see *People v. McWhorter* (2009) 47 Cal.4th 318, 380) and will order the $300 fine imposed under section 1202.45 stricken.

VI. Senate Bill No. 1393

On January 1, 2019, Senate Bill No. 1393 took effect "and amend[ed] sections 667, subdivision (a) and 1385 to give trial courts discretion at sentencing to strike five-

year prior serious felony enhancements in 'furtherance of justice.' (Stats. 2018, ch. 1013, §§ 1–2.)" (*People v. Johnson* (2019) 32 Cal.App.5th 26, 68.)

In supplemental briefing, the parties agree that the matter should be remanded so that the sentencing court may choose whether to strike the prior serious felony enhancement (§ 667, subd. (a)) in this case. We accept the concession, and will remand the matter for that purpose. (See *People v. Johnson*, *supra*, 32 Cal.App.5th at pp. 67–68.)

DISPOSITION

The enhancement imposed under section 667.61, subdivision (d)(4) is stricken. The $300 fine imposed under section 1202.45 is stricken. The matter is remanded to allow the superior court to consider whether defendant's prior serious felony enhancement should be stricken. In all other respects, the judgment is affirmed.

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LEVY, Acting P.J.

WE CONCUR:

_____
FRANSON, J.

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MEEHAN, J.